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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA
SECOND APPELLATE DISTRICT
DIVISION ONE

THE PEOPLE,

Plaintiff and Respondent,

v.

ALBERT MANZANARES,

Defendant and Appellant.

B153448

(Super. Ct. No. BA210817)

APPEAL from a judgment of the Superior Court of Los Angeles County, Bob S. Bowers, Judge. Affirmed.

Linn Davis, under appointment by the Court of Appeal, for Defendant and Appellant.

Bill Lockyer, Attorney General, Robert R. Anderson, Chief Assistant Attorney General, Pamela C. Hamanaka, Senior Assistant Attorney General, Theresa A. Cochrane and Nora Genelin, Deputy Attorneys General, for Plaintiff and Respondent.

INTRODUCTION

Defendant Albert Manzanares appeals from a judgment of conviction entered after a jury found him guilty of possessing a weapon while in custody (Pen. Code, § 4502, subd. (a)), and the trial court found true the allegations that defendant previously had been convicted of two serious or violent felonies (Pen. Code, §§ 667, subds. (b)-(i); 1170.12). The court thereafter sentenced defendant to state prison for a term of 25 years to life.

Defendant contends the trial court erroneously answered the jury's questions concerning whether and when possession of the weapon might be excused, abused its discretion in denying his motion to strike a prior conviction, and his sentence constitutes cruel and unusual punishment. We reject defendant's contentions and affirm the judgment.

FACTS

On November 12, 2000, defendant was transferred from one jail module in the Men's Central Jail to another module on a different floor. Before transferring defendant, Los Angeles County Deputy Sheriff Dennis Salcedo conducted a pat-down search. He recovered no contraband from defendant, who was wearing handcuffs and a waist chain. Defendant traveled through a metal detector, after which Deputy Salcedo escorted him down two escalators and through another metal detector to the new module.

Deputy Salcedo entered the sallyport, an area between the module entrance gate and the row gate of the new module, where he transferred defendant to Deputies Hermann and Ciscel, who worked in that module. Deputy Hermann instructed defendant to enter the gated shower area for the purpose of conducting a full body cavity search. Defendant entered the shower area, after which the deputies removed his handcuffs and

waist chain. Deputy Hermann closed and locked the gate. Deputies Salcedo, Hermann and Ciscel observed defendant from outside the gate.

Deputy Hermann instructed defendant to remove his clothing. Defendant did so. He then followed commands to stick his hands straight up and wiggle his fingers, and to run his fingers inside his mouth to check for any contraband. As defendant performed these tasks, he was facing Deputy Hermann. When defendant lifted his testicles on command, Deputy Salcedo saw a white piece of cloth hanging below the testicles. Deputy Hermann thought he saw toilet paper.

Deputy Hermann instructed defendant to turn around, face the wall, lift each foot and wiggle his toes. Defendant complied. Deputy Hermann observed nothing unusual at this point. Deputy Hermann then asked defendant to squat and cough. Defendant did not comply. Deputy Hermann repeated the command. Again, defendant failed to comply. When Deputy Hermann stated the command a third time, defendant turned around, faced Deputy Herman and removed an object from his rectal area. He threw the object to the floor. The object was a seven-inch long sharpened metal shank that was three-fourths of an inch wide. It was wrapped in two pieces of sheeting. Deputy Hermann recovered the shank from the shower room floor.

DISCUSSION

Answer to Jury's Question

Defendant was charged with violating subdivision (a) of Penal Code section 4502, which makes it a felony for a person, “while at or confined in any penal institution” to “possess[] or carr[y] upon his or her person” or to have “under his or her custody or control any instrument or weapon of the kind commonly known as . . . any dirk or dagger or sharp instrument” During deliberations, the jury sent the court the following question: “Hypothetically, if the defendant found the shank in the shower, i.e., it was not his and he had not touched it, then he grabs it and tosses it to the officers, is he guilty of

possession of an instrument/weapon?” That is, the jury explained, it wanted to know whether the means or timing by which the defendant gained possession of the instrument or weapon was relevant to his guilt or innocence.

The trial court indicated preliminarily that it was inclined to instruct the jury with CALJIC No. 12.06, which states that momentary possession of an item is not unlawful when possession is not based upon either ownership or the right to exercise control over the item and the sole purpose of possession is to end another person’s unlawful possession of it or to prevent another person from acquiring it by abandoning, disposing of or destroying the item. (*People v. Martin* (2001) 25 Cal.4th 1180, 1191-1192.) The prosecution argued against giving this instruction, in that it embodied an affirmative defense that had not been pled or proved. Defendant argued in favor of giving the instruction. After considering the respective arguments, the court ruled that it would not instruct the jury with CALJIC No. 12.06 or with CALJIC No. 2.50.2, the accompanying standard of proof instruction.

The trial court answered the jury’s question by first noting the significance of the jury’s use of the word “hypothetically.” The court then stated, “It’s not your duty to wonder about hypothetical[s]; it’s your duty to decide *from the evidence that you have heard in this court* what you find to be the facts, and thereafter you apply the law to those facts as you determine them to be. [¶] You don’t have to worry about hypotheticals.” (Italics added.) The court next re-instructed the jury with CALJIC No. 7.38, which defined the crime charged and the elements that had to be proved. Finally, the court informed the jury that the means or timing by which the defendant gained possession of the instrument or weapon was not relevant to defendant’s guilt or innocence.

The principle that momentary possession of an item for the sole purpose of disposing of it has been rejected as a defense to the violation of Penal Code section 4502, subdivision (a). (*People v. Brown* (2000) 82 Cal.App.4th 736, 739-740.) The *Brown* court did not consider, however, whether there *ever* could be a circumstance justifying momentary possession of a weapon in a penal institution. (*Id.* at p. 740.) Assuming for

the sake of argument that there could be such a circumstance and that the defense persuaded the jury that it was improbable that defendant could pass through two metal detectors without the shank being detected, there was no evidence in this case to support using CALJIC No. 12.06 to answer the jury's questions.

The sole *evidence* before the jury is that both guards saw something white dangling when defendant lifted his testicles as commanded. Deputy Salcedo perceived it to be cloth, while Deputy Hermann thought it was toilet paper. After defendant twice failed to comply with Deputy Hermann's command to squat, defendant reached towards his rectal area and tossed the shank at the guards' feet following the third command. However improbable the jury may have thought it that the shank could have gone undetected until that point or that defendant could have maintained such control over it, the only basis upon which the jury could have concluded that defendant first possessed the shank when he tossed it to the deputies is rank conjecture or speculation. There is *no* evidence supporting such a conclusion. The trial court consequently did not err when it told the jury that the jury should not concern itself with hypotheticals and that the means or timing by which defendant gained possession of the shank was irrelevant to his guilt or innocence.

Denial of Motion to Strike Prior Felony Conviction

Prior to sentencing, defendant moved to strike one of his two prior serious or violent felony convictions. The grounds for defendant's motion were that both prior convictions arose out of the same incident, thus indicating that "he really only has one serious felony case behind him"; he hurt no one in the instant matter; and there were psychological or neurological factors that the court should take into consideration. The court denied the motion, finding it most disturbing that defendant twice committed the offense of possessing a weapon while in custody in "almost rapid succession." Moreover, although no one was hurt in the instant matter, it was "just a matter of time." Someone who carries a shank intends to use it at some point as deemed necessary.

In *People v. Superior Court (Romero)* (1996) 13 Cal.4th 497, the Supreme Court held that when a defendant is sentenced under the “Three Strikes” Law (Pen. Code, §§ 667, subds. (b)-(i), 1170.12), the sentencing court retains the discretion under Penal Code section 1385, subdivision (a), to strike the prior convictions on its own motion in the interests of justice. (*Romero, supra*, at pp. 504, 529-530.) Because a decision to strike or not strike a prior conviction lies within the discretion of the trial court, we cannot reverse that decision except for an abuse of discretion. (*Ibid.*)¹

The abuse of discretion standard is a deferential one. (*People v. Williams* (1998) 17 Cal.4th 148, 162.) The question is whether the trial court’s action “‘falls outside the bounds of reason’ under the applicable law and the relevant facts.” (*Ibid.*) That is, we ask whether the trial court’s action is one that would not have been taken by a reasonable judge (*People v. Superior Court (Romero), supra*, 13 Cal.4th at pp. 530-531) or the trial court has acted “in an arbitrary, capricious or patently absurd manner that resulted in a manifest miscarriage of justice” (*People v. Jordan* (1986) 42 Cal.3d 308, 316).

Additionally, “[t]he burden is on the party attacking the sentence to clearly show that the sentencing decision was irrational or arbitrary. [Citation.] In the absence of such a showing, the trial court is presumed to have acted to achieve legitimate sentencing objectives, and its discretionary determination to impose a particular sentence will not be set aside on review.’ [Citation.] Concomitantly, ‘[a] decision will not be reversed merely because reasonable people might disagree. “An appellate tribunal is neither authorized nor warranted in substituting its judgment for the judgment of the trial judge.”

¹

The People suggest the trial court’s denial of defendant’s motion is not subject to appellate review since Penal Code section 1385 does not give a defendant the right to request that a prior conviction be stricken. (*People v. Benevides* (1998) 64 Cal.App.4th 728, 734; but see *People v. Barrera* (1999) 70 Cal.App.4th 541, 553, fn. 7; *People v. Myers* (1999) 69 Cal.App.4th 305, 309; *People v. Gillispie* (1997) 60 Cal.App.4th 429, 433-434.) In the absence of a resolution of this question in the People’s favor by the Supreme Court, we shall address the contention.

[Citations.]’ [Citation.]” (*People v. Superior Court (Alvarez)* (1997) 14 Cal.4th 968, 977-978.)

In deciding whether to dismiss prior convictions under section 1385, subdivision (a), the trial court must consider the defendant’s background, the nature of his current offense and other individualized considerations. (*People v. Superior Court (Romero)*, *supra*, 13 Cal.4th at p. 531.) It must determine whether, in light of defendant’s present and past offenses, “and the particulars of his background, character, and prospects, the defendant may be deemed outside the [‘Three Strikes’] scheme’s spirit, in whole or in part, and hence should be treated as though he had not previously been convicted of one or more serious and/or violent felonies.” (*People v. Williams*, *supra*, 17 Cal.4th at p. 161.)

Defendant has three prior felony convictions, two of which qualify as “strikes.” One “strike” was a highly violent felony in which he stabbed the victim, his former girlfriend, in the face and chest with a screwdriver more than 20 times. He did this after kidnapping her. Defendant’s third felony conviction involves the same offense of which he has been convicted in the present case, custodial possession of a weapon. He committed the instant offense before he had been sentenced on the earlier custodial possession offense.

Defendant’s significant criminal history spans six to seven years and includes not only the foregoing felonies, but also a misdemeanor spousal abuse conviction. His criminal history discloses a pattern of increasingly serious and violent conduct. In essence, commencing on August 31, 1998 and continuing through November 12, 2000, defendant went on a spree of violent and dangerous conduct, undeterred by being in custody in the county jail. He is no less dangerous because his inability to conform his conduct to the law’s requirements is the result of brain injury. This consequently is not a mitigating factor.

Giving due consideration to defendant’s entire criminal history and his personal characteristics, the trial court did not abuse its discretion in refusing to strike one of

defendant's prior convictions and sentence him as a second strike offender. (*People v. Jordan, supra*, 42 Cal.3d at p. 316.) There is nothing in the record to suggest that defendant falls outside the spirit of the "Three Strikes" Law.

Cruel and Unusual Punishment

A statutory punishment may violate the constitutional prohibition against cruel and unusual punishment "if, although not cruel or unusual in its method, it is so disproportionate to the crime for which it is inflicted that it shocks the conscience and offends fundamental notions of human dignity.'" (*People v. Thompson* (1994) 24 Cal.App.4th 299, 304; accord, *Enmund v. Florida* (1982) 458 U.S. 782, 788.) In determining whether a sentence is disproportionate, the courts are to consider "the totality of the circumstances surrounding the commission of the offense . . . , including such factors as its motive, the way it was committed, the extent of the defendant's involvement, and the consequences of his acts" (*Thompson, supra*, at p. 305; accord, *Solem v. Helm* (1983) 463 U.S. 277, 291) and the defendant's "age, prior criminality, personal characteristics, and state of mind" (*Thompson, supra*, at p. 305). The application of this proportionality analysis to reduce the conviction or punishment is the exception rather than the rule. (*Thompson, supra*, at pp. 305-306; *People v. Weddle* (1991) 1 Cal.App.4th 1190, 1196-1197.)

In weighing a defendant's age, prior criminality and other characteristics to assess the threat to public safety, the court may consider the nature of past crimes. It may turn to police reports, investigators' statements and probation officers' reports. (*People v. Young* (1992) 11 Cal.App.4th 1299, 1310) The court also may take into account a defendant's lack of regard for rehabilitation during past probation or parole periods. (*People v. Shippey* (1985) 168 Cal.App.3d 879, 887, disapproved on another ground in *People v. Howard* (1992) 1 Cal.4th 1132, 1175, fn. 17, 1178.)

As discussed *ante*, the record supports the imposition of a third strike sentence. Defendant's criminal history and lack of regard for rehabilitation make a long recidivist

sentence appropriate. Commencing on August 31, 1998, defendant embarked on a spree of violent or serious conduct, learning nothing from one arrest and confinement to the next. As noted *ante*, that he is unable to conform his conduct to the requirements of the law due to brain injury makes him no less dangerous. Indeed, it reasonably may be viewed as making him more dangerous to society. It thus is not a mitigating factor but rationally may be considered an aggravating factor. Moreover, the offense of which defendant presently stands convicted is not relatively insignificant but rather poses a great danger to the custodial population and, hence, a substantial risk to society. (See *People v. Brown*, *supra*, 82 Cal.App.4th at pp. 739-740.)

Recidivism in the form of the repeated commission of felonies poses a clear danger to society. It justifies the imposition of longer sentences for subsequent offenses. (*People v. Kinsey* (1995) 40 Cal.App.4th 1621, 1630, review den. Mar. 14, 1996.) “The purpose of a recidivist statute . . . [is] to deter repeat offenders and, at some point in the life of one who repeatedly commits criminal offenses serious enough to be punished as felonies, to segregate that person from the rest of society for an extended period of time. . . . [T]he point at which a recidivist will be deemed to have demonstrated the necessary propensities and the amount of time that the recidivist will be isolated from society are matters largely within the discretion of the punishing jurisdiction.” (*Rummel v. Estelle* (1980) 445 U.S. 263, 284-285; accord, *Harmelin v. Michigan* (1991) 501 U.S. 957, 998-999, conc. opn. of Kennedy, J.)

Proportionality analysis also may include comparison with other sentences imposed in the same jurisdiction and with sentences imposed in other jurisdictions. (*Solem v. Helm*, *supra*, 463 U.S. at pp. 291-292; *People v. Ruiz* (1996) 44 Cal.app.4th 1653, 1665; *People v. Cooper* (1996) 43 Cal.App.4th 815, 825.) Inasmuch as defendant is being punished for his recidivism as well as his current criminal conduct, his comparison of his punishment to that imposed on a murderer is inappropriate. (*People v. Ingram* (1995) 40 Cal.App.4th 1397, 1416, review den. Mar. 14, 1996, disapproved on another ground in *People v. Dotson* (1997) 16 Cal.4th 547, 560, fn. 8; see also

People v. Ayon (1996) 46 Cal.App.4th 385, 400, disapproved on another ground in *People v. Deloza* (1998) 18 Cal.4th 585, 600, fn. 10.) His punishment is comparable to that received by those with similar criminal histories to his own, sentenced under the “Three Strikes” Law. (See, e.g., *Cooper, supra*, at p. 825.) The sentence imposed is not disproportionate to other recidivist sentences imposed in this state. (See, e.g., Pen. Code, §§ 667.7, subd. (a), 667.75.)

Additionally, defendant has not demonstrated that the sentence is disproportionate to the recidivist statutes of other jurisdictions. That most jurisdictions have recidivist statutes more lenient than California’s does not make defendant’s punishment unconstitutional. (*People v. Martinez* (1999) 71 Cal.App.4th 1502, 1516, review den. Aug. 25, 1999.) As previously stated, “the point at which a recidivist will be deemed to have demonstrated the necessary propensities and the amount of time that the recidivist will be isolated from society are matters largely within the discretion of the punishing jurisdiction.” (*Rummel v. Estelle, supra*, 445 U.S. at pp. 284-285.)

Statutes imposing more severe punishment on habitual criminals repeatedly have withstood constitutional challenges. (See *People v. Weaver* (1985) 161 Cal.App.3d 119, 125-126 and cases cited therein; accord, *Parke v. Raley* (1992) 506 U.S. 20, 27; but see *Brown v. Mayle* (9th Cir. 2002) 283 F.3d 1019; *Andrade v. Attorney General of the State of California* (9th Cir. 2001) 270 F.3d 743, 758-760.) Generally speaking, “California’s Three Strikes scheme is consistent with the nationwide pattern of substantially increasing sentences for habitual offenders.” (*People v. Ingram, supra*, 40 Cal.App.4th at p. 1416.)

Although the Ninth Circuit’s decisions in *Brown* and *Andrade* are not binding upon us (*People v. Crittenden* (1994) 9 Cal.4th 83, 120, fn. 3), we note that those cases are distinguishable from the instant matter. Both *Brown* and *Andrade* involved repeat petty thefts prosecuted as felonies. (See, e.g., *Andrade v. Attorney General of the State of California, supra*, 270 F.3d at p. 749.) In assessing the harshness of the penalty, the Ninth Circuit consequently used *Rummel v. Estelle, supra*, 445 U.S. 263 and *Solem v.*

Helm, supra, 463 U.S. 277 for comparison purposes. (See, e.g., *Andrade, supra*, at pp. 758-759.) The same comparison is inappropriate here.

Defendant has not been convicted of a non-violent petty offense. As noted *ante*, he has been convicted of an offense that, while technically non-violent, poses a significant threat of harm to custodial personnel and others in custody and, thus, a substantial risk to society. (See *People v. Brown, supra*, 82 Cal.App.4th at pp. 739-740.) It therefore is more appropriate to compare the harshness of the penalty here to that in *Harmelin v. Michigan, supra*, 501 U.S. 957, where the defendant, a first-time offender, was convicted of possessing 672 grams of cocaine. (*Id.* at pp. 961, 994.) Compared to the life-imprisonment-without-possibility-of-parole sentence that the defendant received in *Harmelin*, defendant's 25-years-to-life-imprisonment sentence is not particularly harsh. Defendant was 27 years old when he was sentenced in this matter. He thus will be eligible for parole while he is still well within his life expectancy. (See *Andrade v. Attorney General of the State of California, supra*, 270 F.3d at p. 759.)

With respect to the gravity of the offense, as noted above, the present offense posed a significant threat of harm to others. As the superior court noted, it was "just a matter of time" until someone was hurt while defendant was armed in a custodial setting. The offense therefore is more comparable to the cocaine possession at issue in *Harmelin v. Michigan, supra*, 501 U.S. 957, which Justice Kennedy characterized as a crime "as serious and violent as the crime of felony murder without specific intent to kill" (*id.* at pp. 1002, 1004) than to the offense in *Solem v. Helm, supra*, 463 U.S. 277, which involved "neither violence nor [the] threat of violence to any person" and a relatively small amount of money (*id.* at p. 296). Moreover, the seriousness of defendant's prior criminal record adds to the gravity of the present offense. (*Andrade v. Attorney General of the State of California, supra*, 270 F.3d at p. 760.) His criminal history is not similar, qualitatively and quantitatively, to that found in *Solem*.

The inference of gross disproportionality the court applied in *Andrade v. Attorney General of the State of California*, *supra*, 270 F.3d 743 operates differently here. Defendant is not facing 25 years to life in prison for an offense that could have been prosecuted as a misdemeanor. The offense is, at base, a felony. While the high term ordinarily is four years, we must consider his prior criminal history. That history includes two very serious offenses, one of which, kidnapping, in itself posed a grave danger to the victim (*People v. Barnett* (1998) 17 Cal.4th 1044, 1148), and the other of which, aggravated assault, was extremely violent in nature. The gravity of these offenses dissipates any possible inference of gross disproportionality that otherwise might arise.

We are unconcerned that defendant had not served a prison sentence for his prior convictions at the time he committed the present offense. His recidivism while in custody awaiting sentencing is, in our view, as serious as comparable recidivism following a period of imprisonment.

In light of his recidivist record, “[d]efendant is precisely the type of offender from whom society seeks protection by the use of recidivist statutes. There is no indication defendant desires to reform or [can] change his criminal behavior. . . . [¶] Fundamental notions of human dignity are not offended by the prospect of exiling from society those individuals who have proved themselves to be threats to the public safety and security. Defendant’s sentence is not shocking or inhumane in light of the nature of the offense and offender.” (*People v. Ingram*, *supra*, 40 Cal.App.4th at pp. 1415-1416; accord, *People v. Ruiz*, *supra*, 44 Cal.App.4th at p. 1665.) In short, defendant’s sentence of 25 years to life imprisonment does not constitute cruel and unusual punishment.

The judgment is affirmed.

NOT TO BE PUBLISHED

SPENCER, P.J.

We concur:

MALLANO, J.

RICO, J.*

* Judge of the Los Angeles Superior Court, assigned by the Chief Justice pursuant to article VI, section 6 of the California Constitution.